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No. 92-97

In The

Supreme Court of the United States

October Term, 1992

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC., COMAIR, INC., MIDWAY AIRLINES (1987), INC., USAIR, INC., AMERICAN AIRLINES, INC., and UNITED AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT OF AERONAUTICS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF ALL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS

The County of Kent, Michigan, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics were Defendants in the District Court and Appellees in the Court of Appeals for the Sixth Circuit. The County of Kent, Michigan has also been referred to as "Kent County" throughout these proceedings. Kent County owns the Kent County International Airport that is managed by the Kent County Department of Aeronautics and by the Kent County Board of Aeronautics. Throughout these proceedings the Respondents, the Kent County Board of Aeronautics and the Kent County Department of Aeronautics, have been referred to as the "Airport."

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I. COUNTERSTATEMENT OF THE CASE

This case has always[1] involved efforts by the Airlines to impose a new business relationship on this Airport in order to obtain a share of, or a credit for, the Airport revenues received from local citizens who use Airport concessions, such as the restaurant, parking lot, and car rental agencies. Thus, in light of the factual void in the Airlines' Petition, the Airport has deemed it important to highlight the public nature of an airport, the two primary types of airport rate-making methodologies, the historic manner in which these Airport rates have been consistently developed by this Airport, and the current financial status of this Airport.

[1] At footnote 11 on page 17 of the Airlines' Petition it is asserted that "the Airlines have never argued ... that concession fees are regulated by AHTA." This assertion is contradicted on the very next page of their Petition (p 18), where the Airlines state, ... "even if the Sixth Circuit was right to deny the AHTA claim on the ground that the statute is inapplicable to concession fees – *a point with which the airlines strongly disagree* . . . " (Emphasis added). Moreover, as this record clearly indicates, the Airlines have always sought "cross-crediting" or "application" of concession revenues to reduce the Airport charges to the Airlines. Earlier both lower courts recognized, discussed, and rejected the now disguised efforts of the Airlines to have concession revenue credits applied so as to reduce their charges (*See* Appendix pages 2a, 10a, 20a, 27a, 30a, 31a, 32a, 50a, and 52a). The cost allocation questions now argued are simply a thinly veiled attempt to obtain some type of crediting of concession revenues. These cost allocation fact questions were properly resolved.

This is a fact-intensive, cost allocation rate case, heavily dependent upon the fact findings[2] of the District Court.

A. Undisputed Facts as to Airport History, Airport Financial Status and Use of Airport Funds.

This Airport is regarded as a small hub airport serving the southwestern Michigan area. Most of the passengers and other Airport patrons at this Airport are southwestern Michigan citizens who constitute the primary consumers generating the concession revenues that the Airlines now seek to share. (2a)

Under the cost allocation methodology used by the Airport, the Airport is a landlord, and all Airport users, including the Airlines, are tenants. (3a; 26a) The fundamental purpose of the Airport is to serve the air transportation needs of the local community. The uncontroverted trial testimony established that the need for the airport, and the resulting presence of the airlines, is derived from the demand of local residents for air transportation. In other words, the community creates the need which results in the presence of the airlines. This is known as "derived" or "primary" demand. Consequently, contrary to their arguments, the Airlines do not create the economic, social, personal or recreational reasons which result in a "flow of passengers" to and from the community.

Kent County owns the Airport. Over the years Kent County and its citizens have advanced $5,532,112.08 (not including interest) from non-airport sources for the creation and expansion of this Airport. There has not been any reimbursement to Kent County. As of December 31,

[2] Reference to earlier Opinions rendered in this case will be to the pages of the Appendix attached to the Airlines' Petition utilizing an "a" page reference. The Sixth Circuit Court of Appeals Opinion is at 1a to 22a. The District Court Final Opinion is at 23a to 40a.

1991 the Airport public financial statements reflect that continuing, airport capital expenditures, as specifically projected at trial, have now reduced retained earnings ("surplus") to $5,940,756.00. In short, as of this date, the Airport current total retained earnings approximate the Airport's historic unreimbursed advances by Kent County.

The Trial Court properly recognized that the Airport's methodology was used as a tool "to determine the break-even costs for the Airlines' use of the Airport." (28a) The District Court further found that the terminal rental rates and landing fees corresponded with these "break-even costs." (37a)

The Airlines mistakenly argue (p 6) that the Airport has a surplus so far in excess of any possible, future needs that somehow this surplus renders these charges unreasonable. Significantly the District Court found that no part of the Airport's accumulated surplus is derived from the Airline charges and that all Airline charges are based on a percentage allocation of historic costs incurred, specifically stating:

> It is clear to the Court that the Airport is charging plaintiffs only for their share of the operating expenses and is not generating any of its surplus revenues from rates and fees charged plaintiffs. Therefore, the Court finds that the Airport's charges to plaintiffs are reasonable in light of the benefits conferred on plaintiffs in exchange for the landing fees and terminal rental rates. (37a)

Moreover, it was shown that the Airport's capital needs include improvements under the FAA National Plan of Integrated Airport Systems ("NPIAS") estimated to cost $19,590,000.00 from 1990 to 1995, and a total of $40,260,000.00 from 1990 through 2000. Another category of projected Airport improvements totaling an additional $10,965,000.00 was purely local in nature (*i.e.*, not encompassed in the NPIAS) and is to be paid for entirely out of local funds.

As undisputed trial testimony indicated would happen, since the 1990 trial the Airport has utilized considerable portions of its December 31, 1989 retained surplus of $9,000,000.00 for its numerous, publicly announced expansion projects, which have been included in the NPIAS and/or in the Airport's public Master Plan. This surplus was reduced to $5,940,756.00 as of December 31, 1991, as indicated in airport public financial statements and in "PFC" (passenger facility charge) information made available to the FAA and to Petitioners. The Airport surplus that the Airlines now seek to share has been generated from community funds and from the non-airline concession revenues. It can only be used for Airport purposes. Under these circumstances, the creation and utilization of this surplus for "Airport-only" purposes is not a legal or factual matter of exceptional national importance to justify the issuance of a Writ of Certiorari. Under the Airport and Airway Improvement Act of 1982 ("AAIA") and related FAA Grant Assurances, all revenues generated by the Airport must remain "on the Airport" for Airport capital or operating costs. 49 U.S.C. App. 2210(a)(12). Such revenues have been so used and have never been made available to Kent County.

At trial there was no evidence of Airport violations of FAA standards, Cost Accounting Standards Board ("CASB") rules, nor of Generally Accepted Accounting Principles ("GAAP") as to any Airline charges.

B. Two Primary Types of Airport Rate-Making Methodologies are Used by Airports.

In their operations at the Airport, the Airlines utilize significant landing areas, necessary clear zone and safety areas, aircraft ramp and apron areas, overnight aircraft parking areas, and space in different portions of the passenger terminal building. At issue in this case is whether the cost allocation methodology chosen and applied by this Airport, as landlord, is unreasonable to determine the user fees and rental rates to be charged to the Airlines, as tenants.

There are two primary airport industry methodologies for the establishment of reasonable airline tenant user rates. The methodology consistently implemented by the Airport since 1968 is known as a "compensatory" or "cost of service" methodology (27a). This methodology is based entirely upon cost allocation principles, and not upon revenue-sharing special lease agreements with the Airlines. The Airport's methodology has always been based upon specific percentage allocations of historic costs incurred, rather than upon any subjective evaluation of the "benefits received" by the Airport tenants. Under the compensatory methodology, the Airport bears the entire risk of meeting its expenses and obtaining funds for expansion. This accounting methodology was accurately summarized and approved in the Sixth Circuit Court of Appeals Opinion (3a) and in the District Court Opinion (27a).

The other airport rate-making methodology is a "residual" methodology under which the airlines (by written lease agreements) share in the airport's risks (*i.e.*, the possibility of profits and losses) on a specific agreed-upon basis and also share in airport management decisions with reference to such business risks. This is not a typical landlord/tenant relationship, but more of a partnership where the airlines assume the risk of guaranteeing the break-even costs of the airport for operations and development. If there is a shortfall in non-airline revenue at the Airport, the Airlines are contractually obligated to cover this shortfall. Residual-type leases require special Airport/Airline voluntary lease provisions which detail the risk/revenue sharing principles that are inherent in a residual methodology. In such residual leases the Airlines customarily control their Airport financial risks by requiring "majority in interest" ("MII") clauses which require that a majority of the airlines agree to the amount and type of airport capital improvements.

Now that this Airport has successfully established its concession operations the Airlines are attempting, by litigation, to impose a "no risk residual" methodology upon this Airport. The Airport has never used a residual methodology. What is at issue in this case is whether this Court should review the decisions of the lower courts holding that the Airlines do not have a legal right to impose a residual-type methodology upon this Airport. Never in previous Airport rate studies has there been any allocation of airside costs to the concessionaires (parking lot, restaurant, gift shop, car rental agencies, etc.) at the Airport. For more than 20 years the Airport has consistently applied its cost accounting methodology to develop the factual foundation for negotiating the landing fees and terminal rental rates reflected in executed leases. (3a, 7a, 27a, 28a)

The Airlines in their Petition continue to mix revenue sharing and residual lease concepts with the Airport's compensatory methodology that has always been a pure cost allocation system. There is no single, simple, magical lease methodology or allocation system that can be tailored to all airports. Neither the FAA nor the Courts has ever attempted to impose a type of methodology upon airports and their airline tenants.

C. Application of the Airport Methodology.

The Airport has used its methodology since 1968. (27a) Before cost allocations are made, the Airline/tenants are always given the benefit of (or "credit" for) the following factors in determining allocated costs under the Airport's methodology (27a):

(a) Fees and rentals are based on actual, incurred cost, not upon "replacement cost" or "current market value."

(b) All federal and state funds received by the Airport are deducted from the cost of the airport improvements before determination of charges to the airlines, leaving only locally contributed costs in the methodology.

(c) The charges to the Airlines do not include the cost of any land or facilities for the following Airport functions and/or other non-Airline tenants: (1) United States government weather station; (2) United States customs office; (3) FAA offices; (4) auto parking lot areas; (5) fixed based operator locations and facilities; (6) car rental service facilities and parking lots; (7) restaurant and gift shop space; and (8) the Airport Motel and land on which it exists.

The landing fees and rental rates which the Airlines agreed to by signed lease agreements for the period from January 1, 1984 through December 31, 1986, the disputed March, 1988 Ordinance landing fees and rental rates effective for April 1, 1988 to December 31, 1989, the Trial Court's Opinion thereon, and Sixth Circuit Court of Appeals Opinion thereon, are as follows:

	1984-86 PREVIOUS LEASE TERMS	1988-89 AIRPORT "NEW" TERMS	TRIAL COURT OPINION	SIXTH CIRCUIT OPINION
Landing Fees	50¢[3]	70.21¢	Approved	Approved[4]
Prime space	$18.00/ sq. ft.	$24.67/ sq. ft.	Approved	Approved
Non-prime space	$10.50-$11.75/ sq. ft.	$12.34/ sq. ft.	Approved	Approved

[3] Per 1,000 lbs. of aircraft weight, charged only for landing.

[4] In a divided Opinion the Sixth Circuit Court of Appeals ordered a remand on the factual issue of CFR cost allocations as between the Airlines and other tenants. This is a fact question that Respondents do not present to this Court for review. Also see Section IVD hereof.

In short, this Airport did nothing more than utilize its historic, cost accounting rate-making methodology to develop new landing fees and new terminal rental rates that were increased for April 1, 1988 to December 31, 1989, when compared to the past lease period of 1984 to 1986. Thus, the relevant landing fee and terminal rental rate comparisons span a five-year period of time. Each detailed reason for each allocated cost component was reflected in the extensive Airport rate study and in all other related exhibits. The major reasons for these increases are set forth below.

The landing fee increase from 50¢ to 70.21¢ resulted from the cost of improvements to the airfield made during the 1984-1987 period, from increased, FAA mandated Crash/Fire/Rescue (CFR) expenses, and from the inflationary increase in Airport operating costs. Approximately half of this landing fee increase was caused by the CFR expenses.

The landing fees (with all CFR costs), when calculated on a *per passenger* basis from 1983 to 1988, decreased from 76.47¢ to 56.77¢.

The Airlines in prior leases accepted $18/sq. ft. and $10.50 to $11.75/sq. ft. terminal rental rates for 1984 to 1986. Airport expenditures during 1984-1987 (primarily a Terminal Building Addition in the amount of $3,174,842.00) justify the increased terminal rental rates. The Airlines did not contest this important and necessary addition to the terminal building, which increased the cost base.

Significantly, the District Court found that the totality of all types of the earlier Airport's 1986 and 1987 charges to the Airlines represented only 1.2% of the Airline revenues generated at the Airport. (37a) The totality of the challenged Ordinance user fees, if applied for all of 1988, represented only 1.5% of the 1988 Airline revenue generated. (37a) Thus, the incremental difference or impact of these rates is only 0.3% of all Airline revenues generated at this Airport. The amount and nature of these

challenged airport user fees certainly are not of exceptional national importance, do not violate any federal statute, do not constitute a burden on interstate commerce, and clearly have not caused any airline industry financial devastation.

There is no factual dispute about the incurrence of, need for, or reasonableness of the Airport's actual terminal building costs or actual landing area costs. The only dispute concerns allocation of these costs among different airport tenants. The "bottom line" objective of the Airlines is to transform their status as tenants to that of partners so that the Airlines can share in the concession revenues of this Airport without having shared in earlier risks and financial commitments. As analyzed and argued hereinafter, the Sixth Circuit correctly rejected the attempt by the Airlines to share in the Airport's concession revenue.

II. APPLICABLE LEGAL PRINCIPLES REGARDING CHOICE OF AIRPORT METHODOLOGY AND JUDICIAL RESOLUTION OF ACCOUNTING DISPUTES

As noted in Section I, this case involves the Airline challenges to this Airport's historic rate-making approach. Applicable legal principles do not support this challenge.

A. The Airport has the Legal Right to Choose its Own Rate-Making Methodology.

Each airport has the right to choose its own rate-making methodology, so long as it produces reasonable results. *Raleigh-Durham Airport Authority* v *Delta Airlines*, 429 F.Supp. 1069, 1078-79 (E.D. N.C. 1976). The Airlines have cited no case law, statutory or FAA authority for the proposition that this Airport's "compensatory" or "cost of service" rate-making methodology is illegal *per se*.

B. The Judiciary Wisely Refrains from Entanglement in Complex or Hybrid Accounting Issues.

As noted at trial, the FAA oversees airport operations under the extensive regulatory scheme established in the Airport and Airway Improvement Act of 1982 ("AAIA"). 49 U.S.C. § 2201 *et seq.* AAIA requires that Airlines' charges be reasonable and non-discriminatory. The Airlines never complained to the FAA with reference to these challenged Airport fees.

The FAA has never mandated a specific type of airport rate-making methodology. Nor has the FAA imposed specific accounting principles or standards upon airports to use in formulating airport user fees. The Airport user fees at issue in this case violated no FAA rules and regulations and violated no Generally Accepted Accounting Principles ("GAAP") nor any Cost Accounting Standard Board ("CASB") criteria.

This case has always involved a "battle" over differing airport rate-making methodologies. The Airport has consistently utilized its pure cost allocation system, whereas the Airlines here attempt to impose upon this Airport a no-risk revenue sharing or "residual" lease approach. At issue is the Airport's historic cost allocation system versus the Airlines' suggested hybrid system based upon both different cost allocation concepts and new concession revenue sharing credits. The Courts below properly rejected the Airlines' attempt to dictate the type of methodology to be utilized by an Airport. Nearly 50 years ago in an IRS case Justice Brandeis in a unanimous opinion of this Court observed as follows in *Brown* v *Helvering*, 291 U.S. 192, 204-05; 54 S.Ct. 356, 361; 78 L.Ed. 725, 733 (1934):

> It is not the province of the court to weigh and determine the relevant merits of systems of accounting.

This prudent advice has been consistently followed by this Court in accounting dispute cases.

III. SUMMARY ANALYSIS OF THE ANTI-HEAD TAX ACT AND RELATED FEDERAL AIRPORT STATUTES

The Anti-Head Tax Act (AHTA), when enacted, and when amended in 1990, is part of an Airport federal statutory framework. The Airlines' AHTA concession revenue contentions are inconsistent with the legislative history of AHTA and inconsistent with the broader federal statutory framework within which these Airline/Airport disputes must be analyzed. The Airlines' specific certiorari contentions are analyzed in Sections IV, V and VI.

A. 1973 AHTA Enactment Legislative History.

As the title of this federal statute unequivocally indicates, the Anti-Head Tax Act ("AHTA") was designed to prohibit airports from imposing the type of "head taxes" (per passenger charges) earlier approved by this Court in *Evansville-Vanderburgh Airport Auth. Dist.* v *Delta Airlines*, 405 U.S. 707; 92 S.Ct. 1349; 31 L.Ed. 2d 620 (1972). AHTA was not enacted with the intent of altering pre-existing Airport landing fees and terminal rental rates that historically had been imposed upon the commercial airlines [49 U.S.C. § 1513(b)].

The Federal AHTA provisions were enacted in 1973 as one part of a broader statutory plan[5] to increase the availability of federal funds for public airports to cover the costs of airport development.

The Anti-Head Tax Act, in relevant part, reads as follows:

> 1513(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the

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[5] Titled the Airport Development Acceleration Act of 1973, P.L. 93-44.

> carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.
>
> 1513(b) Nothing in this section shall prohibit a State (or political subdivision thereof . . .) . . . from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Nowhere in this short statutory provision and *nowhere* in its legislative history is there any indication that Congress ever considered or intended to regulate any aspect of airport concession income. Congress was aware of Airport concession revenues (and the surpluses above costs they generate) and recognized those revenues as legitimate and necessary for Airport expansion. (Airport Development Acceleration Act of 1973; Senate Committee Report at 119 Cong. Rec. 3348 at 3352.)[6]

The whole thrust of the enactment of AHTA was to prohibit states (and local governments) from taxing the *act of enplanement* on which the Federal Government had already imposed a uniform Federal user tax system.

B. The 1990 Passenger Facility Charge ("PFC") Amendments to AHTA Specifically Authorized Limited Head Taxes.

In 1990 the 101st Congress amended the AHTA through Passenger Facility Charge ("PFC") legislation [49 U.S.C. App. § 1513(e)] that now permits airports to impose a PFC of $1, $2, or $3 upon each passenger enplaning at the airport. In establishing this current PFC

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[6] For instance, it is clear that Congress in enacting AHTA intended that Airport revenues from concessions be used in financing capital improvement programs, while obviously also recognizing that this intention dovetailed with AAIA that requires that such revenues remain on the Airport for Airport purposes.

program as an amendment to AHTA, Congress in 1990 clearly recognized the continuing massive capital needs of U.S. airports, which were estimated at $50 billion for 5 years, or $10 billion per year, which amount far exceeds the annual amount of federal grants authorized in that same legislation ($1.8 billion for 1991 and $1.9 billion for 1992). [H. Rep. No. 581, 101st Cong. 2d Sess. (1990) at 11 and 16]

The FAA must approve the levy of a PFC, the amount of the proposed fee, and the future airport projects for which PFC revenues will be used. This involves consideration by the FAA of the airport capital improvement plans and the future availability of both local and FAA funds. Under procedures in which the Airlines can comment and participate, the FAA audits PFC collections and regulates the utilization of PFC funds. This is another example of how Congress has delegated authority to FAA to oversee airport charges and capital development. The Airport, in view of its substantial capital needs, has applied to the FAA for approval to institute a PFC. [57 Fed. Reg. 24,842-43 (1992)]

Nowhere in the recent PFC legislative history is there any indication Congress intended to limit airport revenues or to require airports to consider their concession revenues (or losses) when formulating airline charges.

IV. THERE IS NO AHTA CONFLICT AMONG THE CIRCUIT COURTS THAT WARRANTS ISSUANCE OF A WRIT OF CERTIORARI. THE SIXTH CIRCUIT COURT OF APPEALS OPINION CORRECTLY RESOLVED THE RATE REASONABLENESS ISSUES

A. The Indianapolis Case is Factually Distinguishable from the Instant Case, Has Never Been Followed By Any Other Circuit, and Creates No AHTA Conflict Worthy of Granting Certiorari.

Indianapolis Airport Auth. v *American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984), the only judicial authority relied

upon by the Airlines at trial for their continuing attack upon the Airport terminal rental rates and landing fees under AHTA, has never been embraced by any other court on AHTA issues. Thus, while *Indianapolis* and this case are clearly distinguishable on their facts, there is no need for the Court to grant certiorari, even if this Court finds that the *Indianapolis* case (on limited concession revenue accounting issues) conflicts with this properly decided Sixth Circuit Court of Appeals Opinion.

The Sixth Circuit distinguished *Indianapolis* on two[7] important grounds. First, "the Indianapolis airport serves in a monopoly environment. As judicially noted by the District Court, Kent County Airport is located less than an hour and a half from two airports serviced by major airlines. This means that the passenger has some role in determining from which airport to travel."[8] (10a)

[7] Also, in *Indianapolis* the landing fees and terminal rental rates were significantly increased in a short time frame ["*almost double* those in the expired leases" (733 F.2d at 1264)]. The Indianapolis Airport Authority *also* "switched" from its earlier "residual" lease to the challenged "compensatory" lease. Previously at the Indianapolis Airport the airlines had been receiving "credits" for portions of the airport concession revenues due to the Indianapolis Airport's voluntary past decision to utilize residual methodology leases. No such residual lease has ever been used at this Airport, and no such credits ever existed at the Kent County International Airport. Further, the *Indianapolis* case was premised upon flawed, inapplicable, cost accounting concepts known as "by-product" and "joint product," which factual arguments were withdrawn by the Airlines' expert witness Charles T. Horngren, when contested by the Airport's expert witnesses in this case.

[8] Petitioners' assertion that this geographical distinction does not negate the Airport's alleged locational monopoly, but only limits it (Petitioners' Brief p 14, fn 8), is unsupported by the Airlines' citation to a separate passage (p 1269) in the *Indianapolis* case, which discusses the ability of passengers to avoid parking lot fees or other specific concession charges at a monopoly location. In fact, the District Court specifically found that "the Airport in Grand Rapids is not in a monopoly situation." (34a)

Second, the Sixth Circuit found that the Airport fees charged to non-airline concessions did not directly affect the airlines or their passengers, citing with favor the following finding in *City and County of Denver* v *Continental Airlines*, 712 F.Supp. 834, 838-39 (D. Colo. 1989) ("*Denver*"):

> Persons affected by the rates, rentals and charges for the restaurants, gift shops, parking lots and rental cars, include persons who are not air passengers . . . no person traveling to, from or through [the airport] . . . is required to park in the parking lot, rent a car, eat at a restaurant or buy a magazine. Those are all individual decisions driven by individual perceptions of need and economic values. That is not the case with respect to the use of the airport's runways, taxiways, and airline portions of the terminal area. [(10a) citing *Denver*, 712 F. Supp. at 838-9.]

The *Denver* Court had further noted that "the Supreme Court found it reasonable for state and local governments to distinguish passengers as a class from other airport users." (*Denver*, 712 F. Supp. at 838, citing *Evansville*, 405 U.S. at 716-18; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 629-30). In contrast, the *Indianapolis* Court made a different factual determination that "the people who use the concessions at the Indianapolis airport are, with rare exceptions, airline passengers." (*Indianapolis* at 1267)

A critical factual, accounting theory difference between this case and the *Indianapolis* case is that *Indianapolis* was premised upon a flawed factual assumption that the Airlines cause the "flow of passengers", whereas in this case uncontroverted testimony established that the population and business base of the local community (not

the Airlines) created the primary need for the public airport. (*See* p 2 hereof)

As the nature of trial testimony and the number of detailed exhibits indicate, this has always been a very fact-intensive rate case regarding the alleged unreasonableness of the Airport landing fees and terminal rental rates. As to both types of fees there were extensive, detailed cost allocation calculations that impact all Airport tenants. This is a cost allocation case, whether reviewed under AHTA or under the Commerce Clause. The Sixth Circuit Court of Appeals properly approved the reasonableness of the cost allocation decisions which the Petitioners seek this Court to review. These factual distinctions do not form a basis for granting certiorari.

B. There is No Active Legal Issue Conflict Among the Circuits Worthy of Supreme Court Resolution.

The 7th Circuit *Indianapolis* decision has been met with a notable lack of enthusiasm by all courts which have specifically addressed AHTA issues since this 1984 opinion. In addition to the lower courts in this case, the *Denver* district court "respectfully declined" (p 839) to follow its AHTA reasoning, specifically also rejecting the public utility analogy urged by the *Indianapolis* case. Similarly, the First Circuit did not adopt the Majority Opinion *Indianapolis* approach, when rejecting the applicability of AHTA to fees assessed on aeronautical users such as airlines. *New England Legal Foundation* v *Mass. Port Auth.*, 883 F.2d 167 (1st Cir. 1989). In these AHTA cases, the circuits are properly deciding on their own that *Indianapolis* is an AHTA concession revenue aberration which requires scant consideration.

Accordingly, this Court's immediate intervention to resolve this alleged conflict is not necessary.

C. The Sixth Circuit Court of Appeals Applied an Appropriate Reasonableness Test Under AHTA. Review of that Decision is not Warranted.

The Sixth Circuit Court of Appeals correctly applied the following AHTA test of reasonableness:

> A fee assessed is reasonable as long as it is based on some fair approximation of the cost of providing the facilities and services, is relevant to the operation of the airport, and is not arbitrary and capricious, but is based on a uniform, fair and practical standard. See *Evansville-Vanderburgh Airport Auth. Dist.* v *Delta Airlines*, 405 U.S. 707, 712-14 (1972), quoting *Hendrick* v *Maryland*, 235 U.S. 610, 624 (1915); *Mass. Port Auth.*, 580 F.2d at 1038. An assessment of costs for the common space need not depend on a district court's estimate of the benefits each renter derives from its customers' use of the common area. Although such a method would be a possible method for assessing costs, there is nothing in the Act that dictates that such a method must be used. (p 11a)

As discussed herein, the 6th Circuit decision is entirely consistent with applicable Supreme Court precedent on rate reasonableness standards, and reached a proper result.

D. Contrary to Airline Petition Assertions, Chief Judge Merritt's Dissent in the Denial of Rehearing on the CFR Cost Allocation Question Is No Basis for Granting a Petition for Certiorari on Other Issues.

The Airlines have distorted the limited nature of Chief Judge Merritt's Dissent from the denial of rehearing with respect to the single issue of the 100% Crash, Fire, and Rescue (CFR) cost allocation. That Dissent, rendered in the context of the Airlines' Motion for an en banc Rehearing, was specifically limited to "the question of

allocating the cost of Airport firefighting and rescue services"[9] (62a). This issue is not before the Court. Accordingly, its disposition affords no basis for the Airlines to petition for certiorari. The Airlines' attempt to fashion a conflict from Chief Judge Merritt's Dissent – which in *all other* respects supported the decision of the original panel – is baseless.

E. The General Aviation Cost Allocation Collection Issue was Properly Resolved and is not a Certiorari Issue.

AHTA established no guidelines for the interpretation of "reasonableness" under § 1513(b). However, AAIA (which must be considered in applying AHTA) expressly places the commercial airlines in a different classification of user than General Aviation entities and/or concessionaires. 49 USC App § 2210(a)(1)(A) and (B). The totality of the Airport's rate-making methodology complies with AAIA, with the applicable Airport Grant Assurances, and with all FAA rules and regulations. Different Airport treatment of different classifications of tenants is expressly permitted by AAIA, confirming historic Airport practices. As the Sixth Circuit Court of Appeals properly observed, the uncollected General Aviation landing fee cost allocations are absorbed by the Airport, and never charged to or paid by the commercial airlines. The

[9] The *Indianapolis* case specifically held that "the bulk of the firefighting costs are properly allocable to the Airlines" (*Indianapolis*, at p 1271). Earlier trial counsel for the Airlines acknowledged in court that the Airlines should be responsible for the "lion's share" of such CFR expenses, noting that the Airlines paid 80% of such expenses at the Indianapolis Airport. (pp 78 to 83 of the January 18, 1990 District Court hearing transcript). This CFR cost allocation variance (between "bulk" or a "lion's share" and 100%) is a limited, fact question not presented to this Court by any party.

Airlines never presented this alleged General Aviation "discrimination" question to the FAA under AAIA.

V. THERE IS NO INTERSTATE COMMERCE CLAUSE ISSUE THAT WARRANTS ISSUANCE OF A WRIT OF CERTIORARI. THE SIXTH CIRCUIT COURT OF APPEALS OPINION CORRECTLY RESOLVED ALL INTERSTATE COMMERCE CLAUSE ISSUES.

A. The Factual Record in This Case Does Not Support a Commerce Clause Claim.

As previously noted, the undisputed incremental (0.3%) difference discussed at page 8 hereof cannot constitute a burden upon Interstate Commerce, nor cause the significant financial industry difficulties now complained of by the Airlines. No Airport/Airline governmental statistics or Airport/Airline industry studies were offered at trial by the Airlines.

With the advent of airline industry deregulation in the late 1970s, the commercial airlines can now increase or reduce air fares, change plane sizes and weights, cease "over-nighting" planes, limit routes, sell gates, reduce rental space, or leave this Airport for any reason without penalty, whether related to Airport charges or not. No major (non-commuter) commercial airline has ever chosen to leave this West Michigan Airport.

In this case the judiciary has not "abdicated" its Commerce Clause responsibility as argued at page 23 of the Airlines' Petition. The Airlines' factual proofs[10] never

[10] Directed to each Airline early in the discovery period were numerous specific Interrogatories designed to isolate the Airlines' specific Interstate Commerce Clause contentions regarding the allegedly illegal and/or unreasonable Airport fees and charges. The identical Answers of all Plaintiffs revealed absolutely no unique facts that would allow this Court to distinguish between a "reasonableness" inquiry under an Interstate

triggered even a theoretical consideration of the Commerce Clause. In short, the Interstate Commerce Clause was not "automatically rendered inapplicable to an area of commerce" as broadly argued in the second "Question Presented" by the Airlines.

In any event, as noted below in Sections B and C, there is no legal basis for the Airlines' Interstate Commerce Clause contentions.

B. There is no Conflict Among the Circuits, all of Which Circuits in Airport Cases Have Held that the Interstate Commerce Clause is not Legally Applicable to Airport Landing Fees and Terminal Rental Rates.

It is clear that the District Court and the unanimous opinion of the Sixth Circuit Court of Appeals properly invoked the "dormant" commerce clause approach advanced earlier by this Court in *Merrion* v *Jicarilla Apache Tribe*, 455 U.S. 130; 102 S.Ct. 894; 71 L.Ed. 2d 21 (1982).

In *Merrion* this Court explained and defined the limits of judicial review of alleged Commerce Clause violations, indicating that courts should

> only engage in this review when Congress has not acted or purported to act . . . Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation under the Commerce Clause in the absence of congressional action . . . Courts are final arbiters under the Commerce Clause only when Congress has not acted. *Merrion*, 455 U.S. at 154-5; 102 S.Ct. at 910-11; 71 L.Ed. 2d at 40 (citations omitted).

Commerce Clause analysis, as opposed to a "reasonableness" inquiry under AHTA. Also see Section IV D.

It is unclear whether the Airlines are now suggesting that there is a conflict among the circuits regarding a "dormant" commerce clause approach *in Airport rate cases*.[11] If the Airlines are so arguing, however, this premise is erroneous. No such conflict exists among the circuits in airport rate cases involving interpretation of federal airport statutes and/or FAA regulations and Grant Assurances. [The Sixth Circuit Court of Appeals Opinion (Appendix p 16a-17a); *New England Legal Foundation* v *Massachusetts Port Auth.*, 883 F.2d 157 (1st Cir. 1989) at p 174; and *Indianapolis*, 733 F.2d at p 1266.]

In fact, the *Indianapolis* case (p 1266), citing *Merrion*, clearly stated that Interstate Commerce Clause review was not appropriate to airport rates and charges, given the federal statutory and regulatory scheme which governs them.

It is curious to note that on page 15 of their Petition the Airlines cite *Alamo Rent-A-Car, Inc.* v *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) and *Alamo Rent-A-Car, Inc.* v *Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, ___ U.S. ___; 111 S.Ct. 1073; 112 L.Ed. 2d 1179 (1991) for the apparent, inappropriate proposition that an Interstate Commerce Clause analysis is mandatory. Significantly, these cases involve non-tenants that are not specifically subject to AHTA [§ 1513(b)], under which the Airlines proceeded in this case. In short, the potential for a "dormant" Commerce Clause approach never even existed in these two *Alamo Rent-A-Car* cases. Most significant, however, in the 11th Circuit *Alamo Rent-*

[11] The inapplicable, non-airport commerce clause cases cited by the Airlines at pages 16 to 19 of their Petition wander into newly raised areas of federal preemption or into areas of foreign or interstate commerce where there has been no preexisting federal statute or regulatory agency. Those cases decided outside an Airport context are wholly inapplicable.

A-Car v *Sarasota-Manatee* case is the following critical citation and discussion of the *Evansville* case:

> As discussed above, the fact that different users are charged different fees or that certain users are not charged at all does not invalidate the scheme. *See Evansville-Vanderburgh,* 405 U.S. at 715-19, 92 S.Ct. at 1355-56 (majority of airport users exempted from fee in whole or in part). (906 F.2d at p 521)

The Airlines' apparent efforts to manufacture a Commerce Clause "discrimination" case based upon the *Evansville* case is clearly unwarranted.

Merrion[12] has been properly applied in all similar Airport/Airline rate cases since adoption of AHTA and AAIA. All Circuits are in accord in rejecting the need for a Commerce Clause analysis as to Airport matters covered by AAIA and/or AHTA.

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[12] In *Sporhase* v *Nebraska,* 458 U.S. 941; 102 S.Ct. 3456; 73 L.Ed. 2d 1254 (1982), cited by the Airlines at pages 12 and 18 to limit the scope of *Merrion*, there was no applicable federal statutory scheme or federal regulatory agency in existence. In *Sporhase,* primary resort (on an appropriate factual record) to the Interstate Commerce Clause was necessary. In particular, *Sporhase* involved a contention that Congressional failure to adopt federal statutes and failure to oppose state water agreements resulted in an implied Congressional consent to allow state ground water regulation that would otherwise have been impermissible under the Interstate Commerce Clause. Thus, the *Sporhase* majority opinion referred to "the affirmative power of Congress to implement its own policies concerning such regulation" (p 1264) and to the "unexercised federal regulatory power" (p 1264), while the dissenting Opinion likewise observed (p 1269) that there had been an "absence of any action by Congress." As to appropriate airport regulation Congress has acted extensively. The Airlines' assertion that the *Sporhase* (p 1268) citation to *Merrion* was a limitation on the scope or application of *Merrion* is erroneous.

C. The Sixth Circuit Decision is not in Conflict with This Court's Decision in Evansville.

In judging whether the amount of the collected head taxes (per-passenger charges assessed by airports) approximated the actual costs incurred by the Indiana and New Hampshire airports for the governmental benefits provided, this Court in *Evansville* properly observed that, as to such financial analysis, a court "must be content with 'rough approximation rather than precision,' " ruling concisely as follows:

> At least so long as the toll is based on some fair approximation of use or privilege for use, . . . and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. *Evansville,* 405 U.S. at 716-17; 92 S.Ct. at 1355; 31 L.Ed. 2d at 629.

In short, when analyzing the potential interstate commerce burden or alleged discrimination occasioned by airport charges, there is no single formula or universally accepted accounting approach or analysis. Appropriate study is focused upon the amount of the charge, not the formula or accounting methodology that produces the charge.

The Court in *Evansville* found that the head taxes in question "reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed." (405 U.S. at 717; 92 S.Ct. at 1355; 31 L.Ed. 2d at 629). With respect to the fees for which Petitioners seek review in the present case, the District Court found that "the plaintiffs were charged the break-even costs for the areas they use." (37a) Thus, the fees assessed on the Airlines are clearly not "excessive in comparison with the governmental benefit conferred."

While arguing the *Evansville* case the Airlines continue to confuse the objective approach of historic cost allocations with the subjective evaluation of benefits[13] received by Airport tenants who rent and use numerous Airport facilities. Nowhere does *Evansville* require that costs of airside facilities (which airlines use but concessionaires do not) must be allocated to concessionaires because they "benefit" from the operation of the Airport, so as to reduce the Airlines' cost of using such facilities.

In *Evansville*, the Court recognized that the fee, which was imposed only on airline passengers, exempted "in whole or part a majority of the actual number of persons who use facilities of the airports involved . . . [including] certain classes of passengers, such as . . . passengers on noncommercial flights, nonscheduled commercial flights, and commercial flights on light aircraft. Also exempt are nonpassenger users, such as persons delivering or receiving air-freight shipments, meeting or seeing off passengers, dining at airport restaurants, and working for employers located on airport grounds." (405 U.S. at 717; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 629-630) This Court in *Evansville* further noted that "Certainly passengers as a class may be distinguished from other airport users, if only because the boarding of flights requires the use of runways and navigational facilities not occasioned by nonflight activities. Furthermore, business users, like shops, restaurants, and private parking concessions, do contribute to airpórt upkeep through rent, a cost that is passed on in part at least to their patrons." (400 U.S. at 717; 92 S.Ct. at 1355-56; 31 L.Ed. 2d at 630) Thus, the Court recognized distinctions between those who use airside facilities and those who do not, and explicitly

[13] Because their fees are based on historic costs, not on higher market rates or on higher replacement costs, the Airlines also "benefit" from the Airport facilities they use to a much greater extent than they pay for them.

distinguished passengers as a class from those who use concessions.

As to the requirement that fees are not excessive in comparison with the governmental benefit conferred, this Court found that the airlines in *Evansville* had "not shown these fees to be excessive in relation to costs incurred by the taxing authorities" (405 U.S. at 719; 92 S.Ct. at 1357; 31 L.Ed. 2d at 631), noting further that there was no evidence that the fees would do more than meet the past as well as current deficits of the airport which had been subsidized by the locality. In the instant case the fees imposed on the Airlines only "break even" with the airside and terminal costs associated with the Airlines' actual use of those facilities. (3a; 28a; 37a)

The Airlines note that the full allocated costs of General Aviation are not collected from that segment of the industry, apparently equating General Aviation with intrastate aviation without offering any proof for that connection. Nonetheless, in *Evansville*, the Court approved a fee which was imposed *only* on commercial aviation passengers and not on non-commercial passengers (such as General Aviation users). Even if Petitioners' unsupported assertion that General Aviation planes are engaged in intrastate flights to a greater degree than commercial airlines is true, this Court in *Evansville* upheld fees imposed on commercial but not General Aviation passengers. And as the Sixth Circuit noted in its Opinion, any shortfall in the collection of General Aviation fees is made up from the Airport's other income, not from any charges to the Airlines. (18a)

Although Respondents submit that the Airlines' Interstate Commerce Clause argument was properly rejected by the Courts below when applying this Court's decision in *Merrion*, it is clear in any event that all *Evansville* Interstate Commerce Clause standards were met by the Airport charges challenged by the Airlines.

D. An AHTA "Reasonableness" Inquiry is Equivalent to a Commerce Clause Analysis.

A final reason that the Airlines' Commerce Clause arguments do not raise an issue worthy of consideration by this Court is that the "reasonableness" standard as applied by the Sixth Circuit with respect to AHTA is functionally equivalent to any Commerce Clause "reasonableness" test. Significantly, the Airlines have offered no factual or legal authority for a unique Commerce Clause concept of reasonableness. The Airlines were able to raise all of their reasonableness arguments in the context of an alleged AHTA violation. Both the District Court and the Court of Appeals found these Airport fees to be reasonable.

VI. THERE IS NO ERRONEOUSLY DECIDED ISSUE OF NATIONAL IMPORTANCE

In accordance with applicable law establishing an Airport's right to choose its own rate-making methodology and in accordance with the appropriate application of "reasonableness" standards, the Sixth Circuit properly resolved all factual cost allocation issues which the Airlines seek to have this Court review.

The Airlines in their Petition now grope for inapplicable Airport/Airline industry statistics[14] that are outside the factual record of this case.

The Airlines now arcanely appear to suggest that somehow this Airport's 0.3% incremental impact on their ticket revenues at this Airport (for 1988 and 1989) has caused the recent (1992) wild swings in airline industry profits and losses. The ridiculousness of such an assertion is illustrated by the following facts *in this record*:

[14] For instance, the Airport "operating profit" statistics cited by the Airlines at page 20 do not take into account the capital needs and expenses of the airport industry. Nor do these Airport "operating profit" statistics uniformly and reliably include depreciation expenses or interest costs.

(a) For more than 20 years this Airport's methodology has remained the same, while nationwide airline industry profits have "yo-yoed" during periods of time both before and after airline deregulation. The Airport's compensatory type methodology has been used by many other airports for many years. Thus, compensatory methodology leases are not the cause of any current airline industry financial difficulties.

(b) The average per-passenger ticket price (or revenue) for the Airlines at this Airport has increased from $135.72 in 1986 to $151.41 at the end of the first quarter of 1989. This increase in ticket prices far exceeds Airport charge increases on an equivalent per-passenger basis.

(c) Despite the statements at page 21 of the Airlines' Petition, net income at this Airport has not "continued to soar", as confirmed by the Airport's public financial statements available to the Airlines.

(d) Business decisions are never made in a vacuum. It must be noted that during the 20 years (both before and after Airline deregulation) that the Airport has been utilizing this rate-making methodology no major (*i.e.*, non-commuter) commercial airline has left this Airport. On the contrary, Delta Airlines commenced service at this Airport during this litigation.

(e) The Airlines' assertion at page 22 that fees at airports "have steadily increased at rates far above inflation" is inaccurate as applied to this Airport. For the period of time from 1983 through 1988, the increase in such per-passenger costs was only a total of 15.3%

for such six years, whereas the CPI inflationary increase from 1983 through 1988 was 18.8%.

While the totality of national Airport charges to airlines have remained at a constant small percentage (4% or less) of total airline expenses, other areas of airline expenses (fuel, employee benefits, bankruptcy protection of certain competing carriers, mileage or bonus programs, airfare "wars", initiation or cessation of routes, etc.) have been the cause of the Airlines' current financial difficulties. Airline 1992 press releases and public financial statements confirm this airline industry assessment.

In short, the Airlines' current financial wounds are self-inflicted, are certainly not caused by this Airport's historic rate-making approach, and are not independent grounds to grant certiorari in this case.

VII. CONCLUSION

The Airlines' Petition for Issuance of a Writ of Certiorari should be denied.

Respectfully Submitted,

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